U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 30Oct2001

In the Matter of:	:	
ERMINE E. ROSE	:	
Claimant	:	
v.	:	Case No: 2001-BLA-321
ROBINSON-PHILLIPS COAL COMPANY and ANGUS MINING COMPANY	:	
Employers	:	
and	:	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS	:	
Party-in-Interest	:	

Ermine E. Rose, *Pro Se*

Mary Rich Maloy, Esq.
For Robinson-Phillips Coal Company

BEFORE: EDWARD TERHUNE MILLER
Administrative Law Judge

DECISION AND ORDER - DENYING BENEFITS

Statement of the Case

This proceeding involves a third subsequent or duplicate claim for benefits under the Black Lung Benefits Act, as amended, 30 U.S.C. 901 *et seq.* (hereinafter "the Act") and regulations promulgated thereunder.[1] Since this claim was filed in 1997, Part 718 applies.

[1] All applicable regulations which are cited are included in Title 20 of the Code of Federal Regulations, unless otherwise indicated, and are cited by part or section only. Director's Exhibits are indicated as "DX" and the Transcript of the Hearing is indicated as "TR". Employer's Exhibits are indicated as "EX."

Because the Claimant Miner was last employed in the coal mine industry in West Virginia, the law of the United States Court of Appeals for the Fourth Circuit is controlling. (DX 2). *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

The Claimant, Ermine E. Rose, filed his first claim for benefits on October 25, 1985 (DX 42-1). The claim was denied by Administrative Law Judge Clement J. Kichuk in a decision and order dated May 23, 1989 (DX 42-22). Judge Kichuk found twenty-one years of coal mine employment and concluded that the Claimant failed to establish the existence of pneumoconiosis or that he was totally disabled. The decision was not appealed and became final. Claimant filed his second claim for benefits on January 16, 1991 (DX 41-1). The claim was denied by the District Director on July 16, 1991, and became final (DX 41-33). The Claimant filed a third claim on November 3, 1995 (DX 40-1). It was denied by the District Director on April 18, 1996, because the evidence did not show that Claimant was totally disabled by pneumoconiosis (DX 40-30). In the absence of appeal, it became final. He filed a fourth claim on August 25, 1998, (DX 39-1), but moved to withdraw the claim in December 1998 (DX 39-12). On December 22, 1998, the District Director approved the Claimant's motion to withdraw, noting that the result was as if the fourth claim had never been filed (DX 39-13).

The instant claim was filed by the Claimant on March 20, 2000 (DX 1). Angus Mining Company Inc. was given notice of the claim on April 7, 2000, and Robinson-Phillips Coal Company was given notice of the claim on April 10, 2000 (DX 24, 23). The District Director made an initial finding of eligibility for benefits on August 29, 2000 (DX 27). Robinson-Phillips Coal Company controverted liability on September 5, 2000 (DX 29). There was no response from Angus Mining Company, Inc. Another notice of initial finding of entitlement was made by the District Director on October 31, 2000 (DX 33). Robinson-Phillips requested a hearing, and the case was referred to the Office of Administrative Law Judges on December 22, 2000 (DX 37, 43, 44).

A hearing was held in Pipestem, West Virginia on May 7, 2001, at which all parties were afforded a full opportunity to present evidence and argument. Director's Exhibits one (1) through forty-four (44), and Employer's Exhibits one (1) through sixteen (16) were received into evidence (TR 44). On August 9, 2001, the U.S. District Court for the District of Columbia issued a decision granting the Department of Labor's motion for summary judgment and dissolving the Preliminary Injunction Order issued in *Nat'l Mining Ass'n v. Chao*, Civ. No. 1:00 CVO 3086 (D.D.C. Feb. 9, 2001), which held claims pending as of January 19, 2001 in abeyance pending the outcome of the case. Thus this tribunal's rule that the amended black lung regulations would not affect the outcome of this case is moot. Since the claim was pending on the effective date, January 19, 2001, of the amendments to Parts 718 and 725, issued on December 20, 2000, consideration of the claim is governed by those amended regulations in accordance with their terms.

ISSUES

(1) Whether the miner has coal workers' pneumoconiosis?
(2) Whether the miner's pneumoconiosis arose out of his coal mine employment?
(3) Whether the miner is totally disabled?
(3) Whether the miner has proved that he is totally disabled due to pneumoconiosis?
(4) Whether Claimant has proved a material change in condition since his last claim was denied?
(5) Whether Robinson-Phillips Coal Company is the responsible operator?

FINDINGS OF FACT, DISCUSSION, AND CONCLUSIONS OF LAW

Background and Coal Mine Employment

Claimant, Ermine E. Rose, was born on August 22, 1938 (DX 1). He has no dependents, as his wife, Mary Yates Rose, died on October 24, 1999 (DX 1, 14; TR 20). He testified that he quit school in sixth grade; that he was last employed in the coal mines as a roof bolter for Angus Mining Co.; that he was laid off in January 1987; and that he has not been employed in any capacity since (TR 15, 23, 26).[2] Claimant testified that since his April 1996 denial, he "can't walk anywhere" and seems to be getting worse all the time (TR 27). He suffers from smothering, which has worsened since 1996, and has to sit up in bed for an hour after such attacks (TR 27-28). He cannot garden anymore, and needs his daughter to help him around the house (TR 28). He began taking a "breathing pill" about a year before the hearing, as prescribed by Dr. Hosea (TR 30). Claimant claims to have no medical conditions other than his lung problems, although his back often gives him trouble (TR 30-31). The Claimant testified that he used to smoke half a pack a day, beginning at age twelve, but quit more than five years prior to the hearing (TR 32-33). The Claimant alleges more than twenty-three years of coal mine employment (DX 1). Administrative Law Judge Kichuk found twenty-one years of coal mine employment (DX 42-22; DX 43). On his employment history sheet, the Claimant declared that he worked for Rowe Coal Company from 1958 to 1964; Betty Coal Company from 1965 to March 1971; Robinson-Phillips from March 1971 to April 1977; and Angus Mining from September 1977 to January 1982, for a total of twenty-two years and five months (DX 2).

A letter from Robinson-Phillips Coal Company confirms that the Claimant worked as a roof bolter from March 13, 1971 to April 15, 1977, a total of six years and one month (DX 8). A letter dated July 28, 1986, from Angus Mining Co., Inc. over the signature of David C.

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[2] Claimant repeatedly maintained that he left the mines in January 1983. However, a letter describing his employment with Angus Mining Co., states that he stopped working on January 13, 1982 (DX 9, 41-3). Because the company would likely have had immediate access to business records, its statement is deemed credible.

Jones as President, verifies that the Claimant worked for the company as a roof bolter from September 6, 1977 to January 13, 1982, a total of four years and four months (DX 9). The Social Security records confirms these periods of employment (DX 41-3). When the Claimant worked primarily as a roof bolter he was required to carry bundles of eight to ten plates for the bolts, as well as bundles of ten to twelve bolts which were four to five feet long (TR 25-26).

A letter from Betty Coal Company shows that the miner was employed there as a coal loader for 1965, 1968, 1969, and 1970 through March 1971 (DX 10). The Social Security records confirm five quarters of employment with Betty Coal Company from 1970 through 1971 (DX 41-3). They also show that for two quarters in 1965, Mr. Rose worked for Billies Coal Company, and that he was credited with full years of employment for 1968 and 1969 for Rowe Coal Company. Thus, Claimant may be credited with seven quarters or one and three-quarter years of coal mine employment these periods.

Finally, a letter from Darvin Rowe DBA Rowe Coal Company reveals that the Claimant worked as a coal loader "intermediately" during 1958, 1960, 1961, 1962, 1963, and 1964 (DX 11). Social Security records confirm that the Claimant was employed by Rose Coal Company from 1958 through 1969 for a total of thirty-four quarters or eight and one-half years (DX 41-3). He also worked for various coal companies from 1958 through 1967, for seven additional non-overlapping quarters of employment. Since Judge Kichuk's determination has not been convincingly contradicted and is generally supported by the evidentiary record, Claimant is credited with at least twenty-one years of coal mine employment.

Responsible Operator

Although not listed as an issue on the Form CM-1025 (DX 43), Robinson-Phillips Coal Company informed this tribunal in a letter dated February 1, 2001, that it continued to contest the five issues listed on the CM-1025, "including the responsible operator issue." In a letter dated February 20, 2001, Robinson-Phillips Coal Company again asserted that it was improperly identified as the responsible operator since the Claimant worked more than one year with Angus Mining Company, Inc. after his employment with Robinson-Phillips. At the hearing, Robinson-Phillips's counsel argued that it should not be the responsible operator because the Director failed to investigate adequately whether Angus Mining was still in existence either through its corporate officers or as another coal company, or whether Angus Mining was insured against black lung claims at the time of Claimant's employment (TR 10-11). Claimant testified that Angus Mining was his last coal mine employer, but that it is no longer in business because two men ran the company–Bailey [sic] C. Jones and William Austin–and one died in or about 1996 (TR 24). Claimant believed the surviving partner was living in Coalwood, West Virginia (TR 36).

In Robinson-Phillips's post-hearing brief, Employer pointed out that the Director dismissed the carrier for Angus Mining Company because the company was uninsured and

had dissolved. Because the Director failed to investigate who had owned Angus Mining to determine if they were financially able to assume liability for the payment of benefits, Robinson-Phillips argued that any liability must be assigned to the Federal Black Lung Disability Trust Fund. *See England v. Island Creek Coal Co.*, 17 BLR 1-141 (1993); *see also Donovon v. McKee*, 845 F.2d 70, 10 BLR 2-133 (4th Cir. 1988).

An RMO/IC File Maintenance/Inquiry dated March 29, 2000, disclosed that the "post office reports that [Angus Mining Company, Inc.] has been out of business for years. No record available." This same document recorded that " Ins. card has notation by Kermit Reynolds of RO Section stating that the company was 'never covered prior to 1-19-85'. E. Baker 5/8/96." (DX 4). Only Angus Mining was named in the claim decided by Judge Kichuk and the record discloses that no one appeared at the September 14, 1988, hearing to represent Angus Mining (DX 42-20, -21, -22). An undated notice of claim was sent to Robinson-Phillips, to which Robinson-Phillips's carrier responded on April 17, 2000 (DX 23-24). At that time, the Respondent reserved all issues for controversion. The same notice of claim was sent on April 7, 2000, to Angus Mining Company Inc. in care of its carrier, West Virginia CWP Fund, which responded on April 17, 2000 that it contested all issues (DX 25-26).

The Director sent for signature to both employers an agreement to pay benefits for their signatures on August 29, 2000 (DX 27). A notice of initial finding was sent at the same time, to Robinson-Phillips, designated as "Second Employer" (DX 27). In response to the notice of claim, the West Virginia Bureau of Employment Programs, Office of Coal-workers' Pneumoconiosis Fund, provided a letter dated October 19, 2000, stating that Angus Mining's effective date for insurance coverage was January 19, 1985 to June 16, 1986, after Claimant's employment with Angus Mining (DX 31). Therefore, the carrier requested that it be removed from the claim. On October 31, 2000, a claims examiner with the Department of Labor advised Angus Mining, in care of the West Virginia CWP Fund, that it could not be considered a responsible operator (DX 32). Thus, it was relieved of liability.

Apparently, the letter was meant to dismiss only the West Virginia CWP Fund, as, on October 31, 2000, another notice of claim and agreement to pay benefits was sent to both Angus Mining Company Inc., as uninsured, and Robinson-Phillips (DX 33). On that same date, letters were sent to both Angus Mining and Robinson-Phillips, requesting that they begin benefit payments (DX 34). The documents sent to Angus Mining Company were returned to sender (DX 35). As of November 15, 2000, the Director sent letters to the Claimant stating that both employers were responsible for the payment of his benefits (DX 38). Both companies were named when the claim was referred to this office on December 22, 2000 (DX 43, 44).

In a September 18, 1998 letter to the West Virginia Secretary of State, the District Director sought Angus Mining's articles of incorporation and information as to its current status (DX 40-33). The letter stated that if the company were insolvent and uninsured, the

officers of the company might be personally liable for the claim. There is no response of record from the Secretary of State.

Liability is assessed against the operator which meets the regulatory requirements for which the claimant worked most recently and has the financial ability to pay pursuant to § 725.494. *Director, OWCP v. Trace Fork Coal Co. [Matney]*, 67 F.3d 503 (4th Cir. 1995). The Director must investigate and assess liability against the proper operator. § 725.495(b); *England v. Island Creek Coal Co.*, 17 BLR 1-141 (1993). In the absence of evidence to the contrary, it is assumed that the designated responsible operator is capable of assuming liability for the payment of benefits in accordance with § 725.494(e).

Because the Director has proceeded against both Angus Mining and Robinson-Phillips in this proceeding for a prolonged period of years, there is no prejudice to Robinson-Phillips. However, in determining whether Angus Mining, the most recent employer of at least one year, is capable of assuming its liability for the payment of continuing benefits pursuant to § 725.494(e), it may be inferred on this record that Angus Mining or its principals cannot satisfy the pending claim for black lung benefits. Angus Mining has repeatedly failed to appear to satisfy its burden of proving that it does not possess sufficient assets to secure the payment of benefits pursuant to § 725.495(c)(1). The record documents and testimony establish that Angus Mining has long been out of existence; that it was not insured against black lung claims as required during the time of Claimant's employment; and that it was not self-insured. § 725.494(e)(1) and (2). The Director's documented attempt to contact Angus Mining on numerous occasions, and to obtain information about the corporation through the West Virginia Secretary of State, were unsuccessful. Because Angus Mining has been so long out of existence and because, according to Claimant's testimony, one of the two men who ran the company is now dead, this tribunal finds that the Director has satisfied its burden under § 725.495(b), despite the absence of definitive proof that the surviving officer of Angus Mining has no assets for the payment of any black lung benefits that might be awarded. Accordingly, this tribunal finds by a preponderance of the evidence that Robinson-Phillips Coal Company is properly designated the responsible operator.

Medical Evidence

This is a subsequent or duplicate claim which requires determination of whether there has been a material change in conditions based on a preponderance of the medical evidence identitied below which has been developed subsequent to the denial of the prior claim on April 18, 1996. *See Cline v. Westmoreland Coal Co.*, 21 BLR 1-69 (1997).

Chest X-ray Evidence[3]

Exh. No.	Date of X-ray	Date of Report	Physician/ Qualifications	Diagnosis
DX41-20	2/22/91	3/2/91	Ranavaya, B	1/1; p/s; 6 zones; emphysema; prominent hilar bilaterally
DX41-21	2/22/91	4/5/91	Gaziano, B	0/1; s/s; 5 zones
DX41-22	2/22/91	4/30/91	Zaldivar, B	0/1; p/p; 2 zones
EX 11	2/22/91	3/28/01	Scott, B/R	Negative; hyperinflation lungs compatible with emphysema
EX 11	2/22/91	3/28/91	Wheeler, B/R	Negative; minimal hyperinflation lungs compatible with deep breath rather than emphysema
EX 12	2/22/91	4/06/01	Kim, B/R	Negative; hyperinflated lungs, suggestive of emphysema
EX 13	2/22/91	4/12/01	Wiot, B/R	Negative
DX40-22	11/29/95	12/5/95	Patel, R	1/2; p/p; 6 zones; old healed right ninth or tenth rib fractures; density in left zone; emphysema
DX40-23	11/29/95	2/24/96	Francke, B/R	Negative; a few scattered granulomas
DX40-24	11/29/95	3/7/96	Gaziano, B	1/0; q/p; 6 zones
DX40-25	11/29/95	3/26/96	Ranavaya, B	1/1; p/q; 6 zones; emphysema; enlargement of hailar lymph nodes; pleural thickening in the interlobar fissure

[3] The following abbreviations are used in describing the qualifications of the physicians: B = B-reader and R = Board certified Radiologist. To the extent that the credentials of these physicians are not in the record, judicial notice of their qualifications is taken in accordance with www.ABMS.org and the 2000 NIOSH B-reader list. *See Maddaleni v. Pittsburgh & Midway Coal Mining Co.*, 14 BLR 1-135 (1990).

Exh. No.	Date of X-ray	Date of Report	Physician/ Qualifications	Diagnosis
DX 22	4/14/00	4/14/00	Ranavaya, B	1/2; p/q; 6 zones; emphysema; vague clusters are identified in both apices, left worse than right
DX 21	4/14/00	7/12/00	Navani, B/R	1/0; q/p; 6 zones; emphysema
DX 36	4/14/00	10/17/00	Wheeler, B/R	Negative for pneumoconiosis; possible focal arteriosclerosis of left coronary; moderate emphysema; granulomata compatible with healed TB
DX 36	4/14/00	10/17/00	Scott,B/R	Negative for pneumoconiosis; hyperinflation compatible with emphysema; healed fracture right tenth rib; possible right upper lung nodule near third rib
EX 3	4/14/00	11/15/00	Kim, B/R	Negative; hyperinflated lungs compatible with emphysema; old healed fracture of right tenth rib; several small questionable nodules in both upper lungs; needs CT evaluation
EX 1	4/14/00	11/30/00	Wiot, B/R	Negative; old rib fracture on right; emphysema
EX 2	4/14/00	12/03/00	Spitz, B/R	Negative; emphysema
EX 8	4/14/00	3/08/01	Meyer, B/R	Negative; focal opacity, right mid lung zone; emphysema; healed right tenth rib fracture; recommend comparison with old films at anterior fourth rib
EX 4	10/24/00	10/24/00	Hippensteel, B	0/1; s/t; 5 zones
EX 6	10/24/00	2/27/01	Wheeler, B/R	Negative; hyperinflation of lungs compatible with deep breath or emphysema; possible subtle fibrosis and

Exh. No.	Date of X-ray	Date of Report	Physician/ Qualifications	Diagnosis
				small calcified granuloma compatible with healed TB
EX 6	10/24/00	2/27/01	Scott, B/R	Negative; hyperinflation of lungs; emphysema versus deep breath
EX 10	10/24/00	3/08/01	Kim, B/R	Negative; hyperinflated lungs

Pulmonary Function Studies

Exh. No.	Test Date	Doctor	Co-op/Undstd/TR[4]	FEV1	FVC	MVV	Qual.[5]	Hgt[6]
DX 40-12	8/22/89	Cardona	Good/Good/Yes	2.79	4.35	123.35	No	71
				2.82	4.13	150.29	No	
DX40-15	4/5/90	Craft	Good/Good/Yes	2.67	4.30	87	No	71"
				2.85	4.20	116	No	
DX 41-17	2/22/91	Vasudevan	Good/Good/Yes	2.86	4.10	99.58	No	71"
DX 40-16	11/29/95	Rasmussen	Good/Good/Yes	2.60	4.28	118	No	70 1/4"
				2.64	4.29	140	No	
DX 17	04/14/00	Ranavaya	Good/Good/Yes	1.49	2.61	44	Yes	70"
				1.59	2.68	40.1	Yes	

[4] Conforming reports of pulmonary function studies must record the miner's level of cooperation and understanding of the procedures, and include three tracings of the maneuvers performed.

[5] Values listed are those values obtained pre-bronchodilator. A second line of values reflect a post-bronchodilator study.

[6] Because of the various heights noted by the examining physicians, the discrepancy is resolved by taking the average of the heights recorded. *See Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). In this case, the average is 70.875 inches.

Exh. No.	Test Date	Doctor	Co-op/Undstd/TR[7]	FEV1	FVC	MVV	Qual.[8]	Hgt[9]
EX 4	10/24/00	Hippensteel	----/----/Yes	1.22	2.12	37	Yes	72"
				1.24	2.18	–	Yes	

Drs. Renn and Zaldivar found Dr. Ranavaya's April 14, 2000 study invalid due to insufficient exhalation time (EX 5; EX 7). Both Drs. Renn and Zaldivar are board certified in internal medicine and pulmonary disease. Dr. Gaziano found the study acceptable, but noted that the pre-bronchodilator FEV1 value was erroneously reported on the form and should be 1.49 (DX 18). Dr. Gaziano is board certified in internal medicine and chest disease.

Arterial Blood Gas Studies

Exh. No.	Test Date	Doctor	Condition	pCO2	pO2	Alt.	Qualify
DX 40-12	8/22/89	Cardona	resting	34.5	83	0-2999	No
DX 41-19	2/22/91	Vasudevan	resting	34.6	76.6	0-2999	No
			after exercise	32.6	87.0		No
DX 20	4/14/00	Ranavaya	resting	36.6	76.4	0-2999	No
			after exercise	37.1	81.7		No
EX 4	10/24/00	Hippensteel	resting	38.9	76.0	0-2999	No
			after exercise	39.2	79.2	0-2999	No

Medical Reports/Opinions

Dr. Mario Cardona examined the Claimant on August 22, 1989 (DX 40-12). He obtained a medical history, a history of twenty-three years of coal mine employment, a history of smoking one-half pack of cigarettes a day for five years before quitting in 1974, and the

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[7] Conforming reports of pulmonary function studies must record the miner's level of cooperation and understanding of the procedures, and include three tracings of the maneuvers performed.

[8] Values listed are those values obtained pre-bronchodilator. A second line of values reflect a post-bronchodilator study.

[9] Because of the various heights noted by the examining physicians, the discrepancy is resolved by taking the average of the heights recorded. *See Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). In this case, the average is 70.875 inches.

results of a pulmonary function study, a blood gas study and a physical examination which showed moderate emphysema. Dr. Cardona diagnosed blindness in the right eye, conjunctivitis, and acne rosacea.

Dr. Gary Craft provided a letter dated April 11, 1990, recording the results of his examination of the Claimant on that date. Based upon a history of twenty-three years of coal mine employment, symptoms of exertional dyspnea, two to three pillow orthopnea, and a productive cough, a history of smoking one-half pack of cigarettes a day for five years before quitting in 1973, and an x-ray revealing definite round fibronodular opacities (DX 40-15), Dr. Craft noted a moderate diminution in breath sounds and diagnosed pneumoconiosis related to coal mine employment based on the x-ray and physical findings.

Dr. C. P. Vasudevan examined the Claimant on February 22, 1991 (DX 41-18). Based on eleven years of coal mine employment with Angus Mining as a roof bolter, a medical history, a history of smoking one-half pack of cigarettes a day from 1958 to 1963, an x-ray apparently read by him as 1/1, a pulmonary function study, a blood gas study, and a physical examination which revealed normal lungs, Dr. Vasudevan diagnosed coal workers' pneumoconiosis caused by the miner's work.[10] He gave no opinion regarding impairment, but noted a mild reduction in exercise capacity, most likely due to deconditioning. Dr. Vasudevan is board certified in internal medicine and pulmonary disease.

Dr. D.L. Rasmussen examined the miner on November 29, 1995 (DX 40-17, 18, 19, 20, 21, 22). He recorded the miner's symptoms, medical history, a history of smoking about one pack of cigarettes a day for twenty-eight years, quitting in 1980, 25-26 years of coal mine employment, mostly as a roof bolter, an x-ray interpreted as 1/2, a pulmonary function study, a blood gas study, an EKG, and a physical examination. Dr. Rasmussen found it medically reasonable to conclude that the Claimant has coal workers' pneumoconiosis which arose from his coal mine employment based on an x-ray interpreted as positive by a board certified radiologist and coal mine employment history (DX 40-17, 22). He also diagnosed chronic bronchitis due to coal mine dust exposure and cigarette smoking. He detected minimal ventilatory impairment which would not prevent Claimant's resumption of his last regular coal mine employment. He related the minimal pulmonary impairment to cigarette smoking and coal mine dust exposure. Dr. Rasmussen is board certified in internal medicine.

Dr. Mohammed I. Ranavaya examined the Claimant on April 14, 2000 (DX 17, 19, 20, 22). He considered a medical history including pleurisy and wheezing attacks, twenty-four

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[10] Dr. Vasudevan's reference to the x-ray interpretation 1/1 appears on his form CM-988, Medical History and Examination for Coal Workers' Pneumoconiosis (DX 41-18). There is no separate detailed interpretation signed by Dr. Vasudevan, although the x-ray taken on February 22, 1991, the date of Dr. Vasudevan's examination, was subsequently reread by Dr. Ranavaya, Dr. Gaziano, and Dr. Zaldivar, as 1/1, 0/1, and 0/1, respectively (DX 41-20, 21, 22).

years of coal mine employment, a history of smoking one-half to one pack of cigarettes a day for six years ending at the age of twenty, complaints of a productive cough, wheezing, dyspnea, chest pain, three pillow orthopnea, nocturnal dyspnea, and exertional dyspnea, and the results of an x-ray, a pulmonary function study, a blood gas study, an EKG, and a physical examination. Dr. Ranavaya diagnosed pneumoconiosis based on the coal mine employment history and x-ray interpretation. In his opinion, the Claimant has a moderate pulmonary impairment which would prevent him from preforming his last coal mine job on a sustained basis. He added that the pneumoconiosis contributed to the impairment to a major extent. Dr. Ranavaya is board certified in occupational medicine.

Dr. Kirk E. Hippensteel examined the Claimant on October 24, 2000 (EX 4). He considered twenty-four years of coal mine employment, ending as roof bolter; a medical history; and a history of smoking one-half pack of cigarettes a day for seven to ten years before quitting at age twenty-five. Dr. Hippensteel reviewed the results of an x-ray, pulmonary function study, blood gas study, EKG and physical examination which he opined showed mild kyphosis with minimal wheezes but no rales and mildly decreased air movement in the chest. Dr. Hippensteel also considered the reports of Drs. Ranavaya, Navani, Gaziano, Craft, and Modi, which included the results of chest x-rays, pulmonary function studies and blood gas studies. Dr. Hippensteel found a lack of sufficient evidence to confirm coal workers' pneumoconiosis. He diagnosed chronic bronchitis, severe obstructive lung disease and asthma, which he concluded were due to cigarette smoking and allergic problems unrelated to coal workers' pneumoconiosis or coal dust exposure. He opined that Claimant's pulmonary function impairment would keep him from going back to his job in the coal mines, but that the cause of the impairment is chronic bronchitis which was not related to his coal mine employment. Dr. Hippensteel is board certified in internal medicine and pulmonary diseases.

Dr. Hippensteel was deposed on April 18, 2001 (EX 15). After providing his credentials, Dr. Hippensteel summarized the findings of his prior medical examination of the Claimant on October 24, 2000, and his February 19, 2001 report. Dr. Hippensteel stated that he had reviewed additional medical evidence since this prior examination, including Dr. Renn's report regarding validation of spirometry studies done on April 14, 2000, additional chest x-ray interpretations by Drs. Wheeler, Scott, Kim and Meyer, the March 15, 2001 report of Dr. Fino, and a report by Dr. Loudon dated March 16, 2001. Dr. Hippensteel found chest x-ray evidence compatible with chronic bronchitis inflammation. He opined that the interstitial markings were not typical of coal workers' pneumoconiosis and lacked sufficient profusion to be attributtable to the disease. He diagnosed asthma unrelated to any coal dust exposure, which he opined was a substantial cause of the Claimant's impairment and disabling condition. Dr. Hippensteel found no evidence of simple coal workers' pneumoconiosis, and opined that the claimant's pulmonary impairment was related chronic bronchitis and asthma. He found no disability resulting from coal dust exposure.

Dr. Gregory J. Fino reviewed specified medical evidence on March 15, 2001, which included a medical history; a history of twenty-four years of coal mine employment, ending as a roof bolter; and a variety of smoking histories ranging from one-half package of cigarettes per day for two years up to one pack per day for fourteen to twenty-eight years (EX 9). He also reviewed the medical reports of Drs. Modi, Cardona, Craft, and Hippensteel, and the results of twenty readings of seven chest x-rays, seven pulmonary function studies, and six blood gas studies. Dr. Fino found insufficient medical evidence to justify a diagnosis of simple coal workers' pneumoconiosis. He found a disabling respiratory impairment due to smoking and/or asthma. From a respiratory standpoint, Dr. Fino opined that the claimant was disabled from returning to his last mining job or a job requiring similar effort. But, Dr. Fino concluded that coal mine dust inhalation neither caused nor contributed to this disability. The Claimant, he opined, would be as disabled had he never stepped foot in the mines. Dr. Fino is board certified in internal medicine and pulmonary disease.

Dr. Robert G. Loudon reviewed specified medical evidence on March 16, 2001 which included a history of working twenty-three years in the coal mines, ending as a roof bolter, and a history of smoking at least one-half package of cigarettes per day for five years before quitting some years prior to the review (EX 10). Based on his review of nineteen chest x-ray readings, seven pulmonary function studies, six blood gas studies, and the medical reports of Drs. O'Leary, Modi, Cardona, Craft, Vasudevan, Rasmussen, Ranavaya, and Hippensteel, Dr. Loudon found insufficient evidence to justify a diagnosis of coal workers' pneumoconiosis. He found objective evidence of pulmonary and respiratory impairment, but did not consider coal workers' pneumoconiosis even a contributing factor thereto. Dr. Loudon opined that Claimant is totally and permanently disabled by respiratory disease, but stated that this disability is not caused in whole or in part by coal workers' pneumoconiosis. In his opinion, the Claimant's disability would not change if he were found to have coal workers' pneumoconiosis. Dr. Loudon's professional qualifications reflect involvement in pulmonary disease, but without further explanation on the record his listed medical qualifications, "M.B., Ch.B. (Edinburgh), MRCPE, [and] FRCPE," are undefined.

On April 18, 2001, Dr. Thomas M. Jarboe reviewed specified medical evidence including twenty-three years of coal mine employment, ending as a roof bolter, a history of smoking one-half to one package of cigarettes per day for twenty-eight years ending twenty years prior to the review, a medical history and symptoms, including attacks of wheezing for the last eight years, frequent colds for the last fifteen years, a productive cough and shortness of breath (EX 14). Dr. Jarboe also reviewed the medical reports of Drs. Ranavaya, Craft, Modi, Hippensteel, O'Leary, Cardona, Vasudevan, and Rasmussen, which included the results of chest x-rays, blood gas studies, and pulmonary function studies. Based on his review of the new medical evidence, he concluded that there was no physiological evidence to support a diagnosis of coal workers' pneumoconiosis. Dr. Jarboe found that the Claimant has severe respiratory impairment which Dr. Jarboe attributed to cigarette smoking and bronchial asthma. In his opinion, the Claimant is totally and permanently disabled due to his

severe obstructive lung disease. Dr. Jarboe opined that Claimant's disabling respiratory impairment was not caused by coal mine employment. Dr. Jarboe is board certified in internal medicine and pulmonary disease.

On deposition on April 26, 2001, Dr. Jerome F. Wiot provided his credentials, and reiterated his interpretations of the three chest x-rays taken on February 22, 1991, April 14, 2000 and October 24, 2000 (EX 16). Dr. Wiot reiterated his opinion that there is absolutely no evidence of coal workers' pneumoconiosis in these x-rays.

Duplicate Claim – Material Change in Conditions

Since the instant claim was filed more than one year after the denial of Claimant's previous claim, it is considered a duplicate or subsequent claim under the Act. § 725.309. Such a claim must be denied on the same grounds as the previous denial unless there has been a material change in conditions since that prior denial became final. § 725.309(d). To prove a material change in conditions, a claimant must prove, under all the favorable and unfavorable medical evidence of his condition subsequent to the previous denial, at least one of the elements previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP,* [Rutter] 86 F.3d 1358, 1362,20 BLR 2-227 (4th Cir. 1996) (*en banc*). In the instant case, the previous denial, dated April 18, 1996, was based on the finding that Claimant did not establish the existence of total disability due to pneumoconiosis. Given Employer's absence from the prior proceedings and contest of issues, evidence dating back to the 1989 denial by Judge Kichuk is also deemed to be relevant. Nevertheless, in order to establish a material change in conditions, Claimant must establish, by virtue of the evidence relating to his medical condition after the previous denial, that he is totally disabled due to pneumoconiosis.

Existence of Pneumoconiosis

For the purposes of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising from coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis. See § 718.201. Section 718.202(a) prescribes four bases for finding the existence of pneumoconiosis: (1) a properly conducted and reported chest x-ray; (2) a properly conducted and reported biopsy or autopsy; (3) reliance upon certain presumptions which are set forth in §§ 718.304, 718,305, and 718.306; or (4) the findings by a physician of pneumoconiosis as defined in § 718.201 which is based upon objective evidence and a reasoned medical opinion.

Under § 718.202(a)(2), pneumoconiosis can be established through a biopsy conducted and reported in compliance with § 718.106. In this case, however, no biopsy evidence has been presented, and so Claimant has not established the existence of pneumoconiosis under § 718.202(a)(2). Section 718.202(a)(3) provides that it shall be presumed that the miner is suffering from pneumoconiosis if the presumptions described in

§§ 718.304, 718.305, or 718.306 are applicable. Section 718.304 is inapplicable because there is no evidence of complicated pneumoconiosis. Section 718.305 is not applicable because this claim was filed after January 1, 1982. Section 718.306 is not applicable because the miner is living.

There are twenty-three x-ray readings by thirteen different physicians of four chest x-rays taken since the previous denial. Eight of the readings are by B-readers or board certified radiologists. Fifteen of the readings are by dually qualified B-readers and board certified radiologists whose opinions may be given the greatest weight. *Scheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). There are a total of six positive readings and seventeen negative readings. Of those readings by B-readers or board certified radiologists, five readings were positive and three were negative. Among the dually certified readers, there was only one positive reading and fourteen negative readings.

Considered individually, the February 22, 1991 x-ray was found positive by Dr. Ranavaya, a B-reader. However, Drs. Gaziano and Zaldivar, who are also B-readers, and Drs. Scott, Wheeler, Kim, and Wiot, who are dually qualified B-readers and board certified radiologists, found this x-ray negative. The superior qualifications of Drs. Scott, Wheeler, Kim, and Wiot, justify a determination that this x-ray is negative for pneumoconiosis.

The November 29, 1995 x-ray was found to be positive by Dr. Patel, a board certified radiologist, and Drs. Gaziano, and Ranavaya, who are B-readers. Dr. Francke, a dually qualified reader, found the x-ray to be negative. Because of the superior qualifications of Dr. Francke, and the Fourth Circuit's disfavor of hollow numerical superiority in weighing x-ray evidence, this x-ray is deemed to be negative. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61 (4th Cir. 1992); *Scheckler*, 7 BLR 1-128.

The April 14, 2000 x-ray was found to be positive by Dr. Ranavaya, a B-reader, and Dr. Navani, a B-reader and a board certified radiologist. Six other dually qualified B-readers and board certified radiologists, Drs. Wheeler, Scott, Kim, Wiot, Spitz, and Meyer, interpreted this x-ray as negative. Because substantially more, better qualified readers interpreted the x-ray as negative, it is deemed to be negative for pneumoconiosis.

The October 24, 2000 x-ray was unanimously found to be negative by Dr. Hippensteel, a B-reader, and Drs. Wheeler, Scott, and Kim, all of whom are dually qualified B-readers and board certified radiologists. Consequently, this x-ray is deemed to be negative for pneumoconiosis. Based on the substantial majority of negative readings by B-readers and dually qualified B-readers and board certified radiologists, this tribunal finds that the x-ray evidence does not establish the existence of pneumoconiosis under § 718.202(a)(1) or a change of conditions with respect to this element of entitlement developed after the prior denial.

The reasoned opinions of the physicians of record also fail to establish the existence of pneumoconiosis under § 718.202(a)(4). In this case, Dr. Craft, Dr. Vasudevan, Dr. Rasmussen, and Dr. Ranavaya diagnosed pneumoconiosis, while Dr. Hippensteel, Dr. Fino, Dr. Loudon, Dr. Jarboe, and Dr. Wiot did not. Dr. Cardona did not address the presence or absence of pneumoconiosis.

A troubling aspect of this case is the Claimant's smoking history. Claimant related to Drs. Cardona, Craft, Vasudevan, Ranavaya a smoking history of one-half pack of cigarettes a day for either five or six years. Claimant apparently told Dr. Cardona that he quit smoking in 1974; Dr. Craft that he quit in 1973; Dr. Vasudevan that he quit in 1963; and Dr. Ranavaya that he quit in 1958. Thus, even though Claimant was relatively consistent in informing these physicians of the length of his smoking habit, he was clearly inconsistent in providing the year in which he quit. Dr. Rasmussen recorded a history of one pack of cigarettes a day for twenty-eight years, ending in 1980, and Dr. Hippensteel considered seven to ten years of smoking one-half pack a day until 1963. At the hearing before this tribunal, the Claimant testified that he began smoking at the age of twelve and smoked for more than five years at the rate of half a pack a day (TR 32-22). He stated that it had been "several years" since he had stopped smoking but he could not remember the exact year (TR 32). By contrast, at the 1988 hearing, Claimant testified that he only smoked for about two years when he was young (DX 42-20, pp. 17-18).

Given the vast disparity of smoking histories provided by the Claimant, this tribunal finds that his testimony on this matter is not credible. To resolve the question, this tribunal finds that the length of the miner's smoking history given to Dr. Rasmussen is probably the most accurate because it would seem likely under the circumstances that the Claimant would be likely to understate his smoking history, because the more extensive history could be perceived as an admission against interest. If Claimant smoked for twenty-eight years before quitting in 1980, then he began smoking at the age of fourteen, which is very close to the starting age he provided at the hearing before this tribunal. Furthermore, it is consistent with his testimony that he quit several years before the 2001 hearing–more than five years, but he could not really remember. Also, by crediting the quitting dates provided to Drs. Cardona and Craft, and considering that he began smoking at the age of twelve, then he would have either a twenty-four or twenty-three year smoking history. As for the extent of the smoking habit, this tribunal finds Claimant smoked at least one-half pack of cigarettes a day because that testimony has been consistent except for that noted by Dr. Rasmussen and Dr. Ranavaya. Accordingly, this tribunal concludes that the Claimant smoked one-half pack of cigarettes a day for twenty-three to twenty-eight years.

Given the finding as to Claimant's smoking history, I find that Dr. Craft's opinion merits less weight because he relied on an erroneous smoking history of a mere five years. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Furthermore, the x-ray on which he reportedly relied is not of record, making it impossible to determine if it supported his determination. Dr.

Vasudevan's opinion is also deemed less credible discounted because he too relied on a smoking history of just five years, and did not consider a full coal mine employment history. He noted only eleven years with Angus Mining. Finally, the x-ray on which he relied was found to be negative by two B-readers and four dually qualified B-readers and board certified radiologists. Accordingly, Dr. Vasudevan's opinion is deemed not to be well reasoned or based on accurate objective data. *See Fuller v. Gibraltar Corp.*, 6 BLR 1-1291 (1984). Dr. Ranavaya's opinion deserves less weight because he too relied on a significantly low smoking history ending in 1958. When this fact is coupled with the consideration that six board certified radiologists who are also B-readers reread his film as negative for pneumoconiosis, it significantly detracts from the probity of Dr. Ranavaya's opinion. Greater weight is accorded to Dr. Rasmussen's opinion because it is well documented and reasoned inasmuch as a board certified radiologist and two B-readers read the x-ray on which he relied as positive for pneumoconiosis and he considered what are deemed to be accurate smoking and work histories. Dr. Rasmussen is also a board certified internist. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Dr. Wiot's testimony on deposition was limited to an explanation of his categorically negative assessment of three x-rays based upon his specialized expertise. The opinions of Drs. Hippensteel, Fino, Loudon, and Jarboe are supported by the totality of the evidence. All four of these physicians reviewed specified medical evidence of record, thereby providing them with a more complete base from which to draw their conclusions. Drs. Hippensteel, Fino, and Jarboe have superior credentials in the fields of internal and pulmonary medicine, and deference is accorded to their opinions for this reason. *See Scott v. Mason Coal Co.*, 14 BLR 1-38 (1990). Dr. Hippensteel also examined Claimant, and his findings are well documented and reasoned. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Therefore, his opinion merits predominant weight both because it is well reasoned and based on objective evidence, and it is further supported by the opinions of Drs. Fino, Loudon, and Jarboe, whose opinions are given considerable weight. Accordingly, this tribunal finds that the medical opinion evidence does not support a finding of the existence of pneumoconiosis under § 718.202(a)(4).

Based on all the medical evidence bearing on the existence of pneumoconiosis, Claimant has failed to establish this element of entitlement pursuant to § 718.202. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 2000 WL 524798 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.2d 22, 24-25 (3d Cir. 1997).

Causation

In addition to establishing the existence of pneumoconiosis, a claimant must also establish that his pneumoconiosis arose, at least in part, out of his coal mine employment. Pursuant to § 718.203(b), a claimant is entitled to a rebuttable presumption of a causal relationship between his pneumoconiosis and his coal mine employment if he worked for at

least ten years as a coal miner. In the instant case, Claimant established twenty-two years and five months of coal mine employment. Thus, had he established the existence of pneumoconiosis, he would have been entitled to the rebuttable presumption that his pneumoconiosis arose from his coal mine employment under the provisions of § 718.203(b). But, because he has not established the existence of pneumoconiosis, the issue is moot.

Disability Due to Pneumoconiosis

Section 718.204(b)(2) provides the criteria for determining whether a miner is totally disabled. These criteria are: (1) pulmonary function tests qualifying under applicable regulatory standards; (2) arterial blood gas studies qualifying under applicable regulatory standards; (3) proof of pneumoconiosis and cor pulmonale with right sided congestive heart failure; or (4) proof of disabling respiratory or pulmonary condition on the basis of the reasoned medical opinions of a physician relying upon medically acceptable clinical and laboratory diagnostic techniques. If there is contrary evidence in the record, all the evidence must be weighed in determining whether there is proof by a preponderance of the evidence that the miner is totally disabled by pneumoconiosis. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-95 (1986).

The four pulmonary function tests conducted between 1989 and 1995 failed to produce qualifying values equal to or less than those set forth in Appendix B to Part 718.

The April 14, 2000 pulmonary function study yielded qualifying values, but Drs. Renn and Zaldivar found it invalid due to insufficient exhalation time. Dr. Gaziano reviewed the test and found it acceptable. All three doctors are board certified in both internal medicine and pulmonary disease. This tribunal accords more weight to the first hand observations of the technician who administered the study and reported that the miner's effort and cooperation were good, as supported by Dr. Gaziano's review, than the invalidation reports of Drs. Renn and Zaldivar who reviewed the tracings. *See Revnack v. Director, OWCP*, 7 BLR 1-771 (1985).

The October 24, 2000 study produced qualifying values and was not reviewed. It was administered by a physician hired by the employer, and as such, this tribunal finds it particularly probative because the result was favorable to the Claimant, but was not invalidated, and was consistent with the results of three of the tests. Because the two most recent studies are five years more current than the most recent prior test they are deemed more probative. Consequently, this tribunal finds that Claimant has established that he is totally disabled pursuant to § 718.204(b)(2)(i).

Claimant has not established total disability under § 718.204(b)(2)(ii) or (iii). None of the four blood gas studies yielded qualifying values under Appendix C to Part 718. Therefore, the Claimant has not established total disability by a preponderance of the evidence, pursuant to § 718.204(b)(2)(ii). There is no evidence of cor pulmonale with right-sided congestive

heart failure. Therefore the Claimant cannot prove total disability pursuant to Section 718.204(b)(2)(iii).

Finally, the medical opinions of the physicians who either examined Claimant or reviewed his medical records must be considered. § 718.204(b)(2)(iv). Drs. Cardona, Craft, Vasudevan, and Wiot did not address the issue of disability. Drs. Ranavaya, Hippensteel, Fino, Loudon, and Jarboe opined that Claimant is totally disabled. Only Dr. Rasmussen did not find the miner totally disabled.

Dr. Rasmussen's opinion is given some weight because it is supported by the underlying objective medical evidence gathered in 1995, and so is well documented and reasoned. *See Perry*, 9 BLR 1-1. However, the opinions of Drs. Ranavaya, Hippensteel, Fino, Loudon, and Jarboe are more persuasive because they are more recent, because they are bolstered by the pulmonary function studies which evince a marked deterioration in pulmonary capacity, and because the physical findings of Drs. Ranavaya and Hippensteel further support their findings of total disability. Finally, the opinions of Drs. Hippensteel, Fino, and Jarboe are found particularly probative because of their superior qualifications. *See Scott*, 14 BLR 1-38. Accordingly, this tribunal finds total disability has been established by the medical opinions of record under § 718.204(b)(2)(iv).

In comparing all the evidence of total disability, both like and unlike, this tribunal is most persuaded by the pulmonary function studies and medical opinions. Consequently, this tribunal finds that Claimant has established a totally disabling respiratory impairment by a preponderance of the evidence. Since this element of entitlement has been established, Claimant has established a material change in conditions.

Total Disability and Causation

A claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis. *See Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986). Under § 718.204(c)(1), a miner is considered totally disabled due to pneumoconiosis if the disease is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a substantially contributing cause if it either has a material adverse effect on the miner's respiratory or pulmonary condition or it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. § 718.204(c)(1)(i) and (ii).

Of the physicians expressing an opinion as to total disability causation, Dr. Rasmussen related what he found to be a minimal pulmonary impairment, not disabling, attributable to both cigarette smoking and coal mine dust exposure. Dr. Ranavaya opined that pneumoconiosis was a major contributor to the Claimant's totally disabling impairment. Dr. Hippensteel opined that the totally disabling impairment was due to chronic bronchitis and

asthma and was unrelated to coal mine employment. Dr. Fino stated that coal mine dust inhalation neither caused nor contributed to the miner's total disability and that the Claimant would have been similarly disabled even if he had never been a coal miner. Dr. Loudon opined that the Claimant is not disabled to any extent by pneumoconiosis and that his opinion would not change even if Claimant were found to suffer from the disease. Dr. Jarboe attributed the Claimant's totally disabling impairment to cigarette smoking and bronchial asthma and not coal mine employment. Thus the preponderance of the recent medical opinions indicates that the cause of the Claimant's totally disabling pulmonary impairment was not in any degree pneumoconiosis or coal mine dust.

As Claimant has now established a material change in conditions, this tribunal must consider the evidence submitted in conjunction with his original claim. In 1988, Dr. Modi opined that the Claimant is totally disabled due to his coal mine employment. Dr. O'Leary did not find pneumoconiosis and gave no opinion on the issue of disability or the cause thereof. Dr. Modi's opinion is given little weight because of his 1988 indictment and plea agreement before the U.S. District Court for he Western District of Virginia at Roanoke, Virginia for committing fraud in his diagnosis and treatment of federal black lung cases. *See Boyd v. Clinchfield Coal Co.,* 46 F.3d 1122, 1995 WL 102226 (4th Cir. 1995); *Adams v. Canada Coal Co.*, Case No. 91-3706 (6th Cir. July 13, 1992) (unpublished).

Because Claimant has not established that he suffers from pneumoconiosis, it is impossible for him to prove that pneumoconiosis is a substantially contributing cause of his disability. The opinions of Drs. Rasmussen and Ranavaya are not persuasive on this issue because they diagnosed pneumoconiosis and relied upon significantly low smoking histories, two factors at the very core of the etiological issue. *Stark*, 9 BLR 1-36. On the other hand, the opinions of Drs. Hippensteel, Fino, Loudon, and Jarboe are consistent with this tribunal's finding that the Claimant has failed to establish the existence of pneumoconiosis. These physicians looked to Claimant's smoking history and established predisposition to asthma as the cause of his disability. That conclusion is logical and supported by the improvement of respiratory capacity after the administration of a bronchodilator. Accordingly, this tribunal concludes that the Claimant has not established that pneumoconiosis substantially contributed to his total disability.

Entitlement

In conclusion, Claimant has not established the existence of pneumoconiosis or total disability due to pneumoconiosis. As a result, his claim for benefits must be denied.

Attorney's Fees

The award of an attorney's fee under the Act is permitted only in cases in which

Claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to Claimant for representation services rendered to him in pursuit of his claim.

ORDER

The claim of Ermine E. Rose for black lung benefits under the Act is hereby denied.

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EDWARD TERHUNE MILLER
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 (thirty) days from the date of this Decision by filing a Notice of Appeal with the **Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601.** A copy of this notice must also be served on Donald S. Shire, Associate Solicitor, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.